Filed 12/11/03 In re E.S. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re E.S., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. L.H. et al., Defendants and Appellants.	E033354 (Super.Ct.No. J103144) OPINION
In re James S., on Habeas Corpus.	E034252 (Super.Ct.No. J103144)

APPEAL from the Superior Court of Riverside County. Cecil J. Mills, Judge. (Retired Judge of the Los Angeles Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Cecil J. Mills, Judge. Petition denied.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant L.H.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and Appellant James S.

William Katzenstein, County Counsel, and Julie A. Koons, Deputy County Counsel, for Plaintiff and Respondent.

Sharon S. Rollo, under appointment by the Court of Appeal, for Minor.

In this juvenile dependency matter, father and mother appeal from an order terminating their parental rights as to their son, E.S. (born in September 2001), under Welfare and Institutions Code section 366.26.[1] Father also brings a petition for writ of habeas corpus asserting ineffective assistance of counsel (IAC), considered with this appeal.

Father contends in his appeal that the trial court erred in finding jurisdiction and, at the section 366.21 six-month review hearing, finding that the reunification services were adequate. He also complains of receiving ineffective assistance of counsel based on his attorney's failure to (1) oppose termination of reunification services and setting a section 366.26 hearing (.26 hearing); (2) file a writ petition under California Rules of Court, rule 39.1B (39.1B petition) challenging termination of reunification services; (3)

[1] Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

file a section 388 changed circumstances petition prior to the .26 hearing; and (4) provide the court with authority for ordering guardianship rather than adoption at the .26 hearing.

We conclude father waived those issues involving matters which should have been raised by a 39.1B petition or appealed prior to the .26 hearing, and we reject father's IAC claims. The juvenile court's order terminating parental rights and authorizing E.S. placed for adoption was proper. Since mother's appeal is contingent upon father prevailing, mother's appeal is also without merit. We affirm the judgment as to both mother and father. Father's petition for writ of habeas corpus is also denied.

1. Facts and Procedural History

On December 9, 2001, mother and father were arrested, convicted, and incarcerated for dealing drugs while living in a motel room with their son, E.S. He was two months old at the time. Mother had tested positive for marijuana when he was born. The police found 56 grams of rock cocaine and marijuana joint residue in the motel room.

Mother admitted to using marijuana but claimed she did not know father was dealing drugs. She was charged with drug possession and child endangerment, and pled guilty to child endangerment. The court sentenced her to 116 weekends in jail and four years summary probation.

Father had a criminal history, which included two felony convictions in 1994 for possession of drugs and for forged checks. He had also been arrested for public intoxication in 1999 and 2000, and in 1997 for possession of a firearm, and had several

parole violations. In the criminal case leading to the instant dependency proceedings, he was convicted of felony drug possession, with a release date of January 2004, and incarcerated in Susanville State Prison.

On December 11, 2001, the Riverside County Department of Public Social Services (DPSS) filed a dependency petition under section 300, subdivisions (b) (failure to protect) and (g) (no provision for support). The petition alleged E.S.'s parents abused drugs; father perpetrated acts of domestic violence upon mother; and both parents were incarcerated and thus unable to provide care and support for E.S. At the petition hearing on December 13, 2001, the court ordered E.S. detained. The court authorized supervised visitation. The DPSS placed E.S. with his maternal great-aunt and he remained there throughout the dependency proceedings.

At the jurisdictional and dispositional hearing on January 30, 2002, E.S.'s parents waived their right to a trial and the court found that E.S. came within section 300, subdivisions (b) and (g). The court ordered the DPSS to provide both parents with reunification services.

Mother initially visited E.S. regularly but eventually only sporadically visited E.S. She dropped out of three drug treatment programs and tested positive for marijuana in March 2002.

Father, on the other hand, consistently wrote monthly letters to the social worker expressing a desire to participate in treatment programs. He made a concerted effort to comply with his reunification plan in every way possible, including attending Alcoholics

Anonymous (A.A.) and Narcotics Anonymous (N.A.) meetings and an extensive parenting program.

In accordance with the social worker's recommendation, at the six-month review hearing on August 28, 2002, the court terminated E.S.'s parents' reunification services. Mother had made little, if any, progress in complying with her reunification plan. Father was still in prison in Susanville and would not be released for a year and a half. Meanwhile, E.S. continued to live with his great-aunt and her husband, with whom he had bonded. His great-aunt wished to adopt E.S. Father's attorney requested additional reunification services for father but the court concluded the DPSS had provided father with reasonable reunification services and, due to his release date in 2004,[2] he was unable to reunite with E.S. The court thus terminated reunification services and set a .26 hearing.

Father immediately filed a notice of intent to file a 39.1B petition but the court dismissed the petition upon father's attorney withdrawing the notice of intent. His attorney concluded there were no meritorious grounds for filing a 39.1B petition.

According to the social worker's .26 hearing report, filed in December 2002, mother still had not succeeded in completing a drug rehabilitation program and father had been transferred to Corcoran State Prison. He was enrolled in a 12-month substance abuse program. Father continued to send monthly letters to the social worker and

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[2] The .26 hearing review report erroneously states father's release date as January 14, 2003. Father's release date is in January 2004.

[footnote continued on next page]

expressed a great desire to participate in treatment programs. He had been attending parenting classes and other programs while incarcerated. However, the social worker concluded father was not stable enough to reunify with E.S. and recommended terminating parental rights and placing E.S. for adoption with his great-aunt. E.S. was doing well living with his great-aunt and her husband, and they wished to adopt him.

On March 13, 2003, before the .26 hearing, father was permitted a brief in-court visit with E.S. E.S. was given to father to hold. Within about 15 seconds E.S. went back to his great-aunt.

At the .26 hearing on March 13, 2003, father and mother's attorneys requested long-term guardianship rather than adoption but the court concluded there were no applicable exceptions and thus no legal basis for ordering guardianship. Father told the court he had done everything possible to comply with his case plan and pleaded with the court not to place E.S. for adoption. The court nevertheless terminated parental rights and ordered E.S. placed for adoption with his great-aunt.

Father and mother filed a timely notice of appeal and father filed a petition for writ of habeas corpus. Father's trial court attorney concluded there appeared to be no potential issues for an appeal.

2. Waiver

Father appeals from the section 366.26 hearing order terminating his parental rights, claiming multiple errors at various stages in the proceedings, including the court's

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[footnote continued from previous page]

finding of jurisdiction under section 300, subdivision (g) and orders at the six-month review hearing terminating reunification services and setting a .26 hearing. Father also claims he received ineffective assistance of counsel throughout the proceedings.

Father waived these contentions with the exception of his IAC claims that his attorney should have filed a section 388 petition and that father received ineffective representation at the .26 hearing. Father failed to appeal the jurisdiction and disposition orders and failed to file a 39.1B petition under section 366.26, subdivision (*l*), the "exclusively prescribed vehicle for appellate review" of a referral hearing order.[3]

Section 395 provides: "A judgment in a proceeding under Section 300 may be appealed from in the same manner as any final judgment, and any subsequent order may be appealed from as from an order after judgment . . . ." Under this provision the dispositional order in a dependency proceeding is the appealable "judgment." All subsequent orders are directly appealable without limitation, except for orders setting a section 366.26 hearing when the circumstances specified in section 366.26, subdivision (*l*) exist. A consequence of section 395 is that an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order.[4]

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[3] *In re Janee J.* (1999) 74 Cal.App.4th 198, 206.

[4] *In re Janee J., supra,* 74 Cal.App.4th at page 206.

Based on these principles, the court in *In re Meranda P.*[5] held that a mother was barred from appealing an order terminating parental rights. She claimed she had received ineffective assistance of counsel throughout the dependency proceedings but had not appealed from any prior order or sought writ relief from the order setting the section 366.26 hearing. *Meranda P.* held: "The principle--which for convenience we will identify as the 'waiver rule'--that an appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order on an appeal from a later appealable order is sound. We decline to carve out an exception to it here even though the issues raised involve the important constitutional and statutory rights to counsel and to the effective assistance of counsel."[6]

The court in *In re Janee J.*[7] noted: "Permitting a parent to raise issues going to the validity of a final earlier appealable order would directly undermine dominant concerns of finality and reasonable expedition [citation]; the risk of erroneous deprivation of the parent's rights was diminished by the fact that error of this sort requires prejudice to be reversible [citation] and by the significant safeguards built into the system for any parent who may be unable to present an adequate defense [citation]. Enforcing the waiver rule also furthered vital policy considerations of promoting, at that late stage, the predominant

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[5] *In re Meranda P.* (1997) 56 Cal.App.4th 1143.

[6] *In re Meranda P., supra,* 56 Cal.App.4th 1143, 1151.

[7] *In re Janee J., supra,* 74 Cal.App.4th at page 207.

interest of the child and state, preventing a sabotage of the process and preserving the legislative scheme of restricting appeals of final-stage termination orders. [Citation.] The parent, of course, also has the right to express concerns at any stage and take appeals or seek writ review along the way. [Citation.] Extending that rationale, *Meranda P.* held that the statutorily final and nonmodifiable orders in that case could not be collaterally attacked by a petition for writ of habeas corpus. [Citation.] The Supreme Court unanimously denied the mother's petition for review. [Citation.]"

In determining whether the circumstances in this case warrant relaxation of the waiver rule, the following guidelines are set out in *In re Janee J.*: "First, there must be some defect that fundamentally undermined the statutory scheme so that the parent would have been kept from availing himself or herself of the protections afforded by the scheme as a whole,"[8] such as lack of notice of California Rules of Court, rule 39.1B rights. "Second, to fall outside the waiver rule, defects must go beyond mere errors that might have been held reversible had they been properly and timely reviewed. To allow an exception for mere 'reversible error' of that sort would abrogate the review scheme [citations] and turn the question of waiver into a review on the merits."[9]

The *Janee* court noted that "*Meranda P.* recognized that error unfavorable to a parent's interests during the course of dependency may well prove irremediable

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[8] *In re Janee J., supra,* 74 Cal.App.4th at pages 208-209.

[9] *In re Janee J., supra,* 74 Cal.App.4th at pages 208-209.

[citation], yet applied the waiver rule anyway. Finally, it follows that resort to claims of ineffective assistance as an avenue down which to parade ordinary claims of reversible error is also not enough and that it is never enough, alone, to argue that counsel rendered ineffective assistance by not raising potentially reversible error on rule 39.1B writ review of a setting order."[10]

Here, father's objection to the jurisdictional order was waived by his failure to appeal that order and his objections to the six-month review orders terminating reunification services and setting the .26 hearing were waived by failing to file a 39.1B petition.

Father argues that his incarceration and ineffective representation fundamentally undermined the statutory scheme so that he was kept from availing himself of its protections as a whole. We disagree.

Although father's incarceration created an obstacle to father reuniting with E.S., father was not precluded from raising his objections to not receiving visitation and his dissatisfaction with his attorney's representation at an earlier stage in the proceedings. Furthermore, father's incarceration was not the sole basis for the court's order terminating parental rights and placing E.S. for adoption. E.S.'s tender age at the time of the initial detention, the length of father's sentence, the location of the prison, mother's failure to reunite with E.S., and E.S.'s successful placement with relatives who wished to

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[10] *In re Janee J., supra,* 74 Cal.App.4th at page 209.

adopt E.S. were additional factors supporting termination of father's reunification services and parental rights.

As to father's IAC claim, father cites *In re S. D.*[11] for the proposition that even though he did not timely appeal the jurisdictional order, he can nevertheless raise IAC when appealing the section 366.26 ruling. He complains his attorney should have argued there was no jurisdiction under section 300, subdivision (g) (no provision for support) because there were relatives available to care for E.S. at the time of the jurisdictional hearing, as well as when his parents were initially incarcerated.

In *In re S. D.*, the court concluded the mother could challenge the jurisdictional ruling when appealing a section 366.26 ruling. The court concluded the issue was not waived because mother received ineffective assistance of counsel at the jurisdictional hearing[12] and the attorney's error in representing the mother at the jurisdictional hearing was "quite fundamental."[13] The attorney had represented to the court that subdivision (g) applied when the parents were unable to provide for the child whereas the provision stated, alternatively, that the parents were unable to *arrange* for care and support. In *S. D.*, the child's parents provided information enabling the DPSS to arrange for placement

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[11] *In re S. D.* (2002) 99 Cal.App.4th 1068.

[12] *In re S. D., supra,* 99 Cal.App.4th at page 1071.

[13] *In re S. D., supra,* 99 Cal.App.4th at page 1080.

of the child with relatives during the mother's incarceration. The *S. D.* court thus concluded the juvenile court erred in finding jurisdiction under subdivision (g).

Even assuming, without deciding *S. D.* supports the proposition father's IAC claim is not waived as to representation at the jurisdictional hearing, father has not met his burden of establishing any prejudicial ineffective representation. It is highly unlikely that the court would not have found jurisdiction but for his attorney's alleged deficient representation in not arguing against jurisdiction under subdivision (g). Jurisdiction under section 300, subdivision (b) (failure to protect) provided an independent basis for jurisdiction.

As to father's other IAC claims, even if not waived, they are meritless, as discussed below in this opinion. And although the statutory scheme seemed to create an insurmountable obstacle for father to reunite with E.S., it appropriately furthered the best interests of E.S. in being placed in a stable, permanent home, and prevented E.S. and his foster parents being subjected to prolonged uncertainty as to E.S.'s ultimate placement.

We conclude father's objections, other than to his attorney failing to file a section 388 petition and representation at the .26 hearing, are waived or alternatively have no merit. No defect of fundamental proportions is shown to overcome the waiver rule, and the ineffective assistance claim does not change the situation.[14]

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[14] *In re Janee J., supra,* 74 Cal.App.4th at page 212.

3. Ineffective Assistance of Counsel

Father contends his attorney provided ineffective assistance of counsel throughout the dependency proceedings. In particular, he complains: (1) counsel remained silent at the six-month review hearing, when the court terminated reunification services and set a .26 hearing; (2) counsel failed to file a 39.1B petition; (3) counsel failed to file a section 388 petition prior to the .26 hearing; (4) at the .26 hearing counsel failed to provide the court with authority supporting an order placing E.S. in a guardianship rather than ordering termination of parental rights and adoption.

"Where the ineffective assistance concept is applied in dependency proceedings . . . [f]irst, there must be a showing that 'counsel's representation fell below an objective standard of reasonableness . . . [¶] . . . under prevailing professional norms.' [Citations.] Second, there must be a showing of prejudice, that is, [a] 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]"[15]

"The burden is on the [father] to demonstrate conduct falling below the standard of care of the legal practitioner. . . . We cannot assume that the decision was the result of

[15] *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1711, *quoting Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.

negligence, when it could well have been based upon some practical or tactical decision governed by client guidance."[16]

The proper method to raise an ineffective assistance claim is normally by writ of habeas corpus, not appeal.[17] The only exception to the rule requiring a writ for raising an ineffective assistance claim is where "'there simply could be no satisfactory explanation' for trial counsel's action or inaction."[18]

Father asserts his IAC claims both by appeal and by petition for writ of habeas corpus. As in *Meranda*, father collaterally attacks the .26 hearing termination order by means of his petition for writ of habeas corpus, which is supported by (1) a declaration by his appellate attorney stating father's juvenile court attorney claimed she did a good job representing father and denied that she had provided inadequate representation; (2) a letter from father, dated August 8, 2003, to his appellate attorney, discussing what had occurred in the case; and (3) a document confirming that father had attended an eight-month drug treatment program while at Corcoran State Prison. In his petition, father advances the same claims of ineffective assistance of counsel raised in his appeal from the termination order.

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[16] *In re Arturo A.* (1992) 8 Cal.App.4th 229, 243.

[17] *In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1253.

[18] *In re Eileen A., supra,* 84 Cal.App.4th at page 1254.

Father cannot show ineffective assistance of counsel by either petition for writ of habeas corpus or appeal. Preliminarily, as discussed above, we note that father waived his IAC appeal claims, other than as to the failure of not filing a section 388 petition and representation at the .26 hearing.[19]

He also cannot assert his habeas corpus IAC claims as to not filing a section 388 petition and representation at the .26 hearing, according to *Meranda*. In *Meranda*, the court refused to issue an order to show cause on the mother's IAC habeas corpus petition. The court reasoned: "First, the Legislature has expressly prohibited the collateral dispute of a termination order. Section 366.26, subdivision (i), reads in full: 'Any order of the court permanently terminating parental rights under this section shall be conclusive and binding upon the minor person, upon the parent or parents and upon all other persons who have been served with citation by publication or otherwise as provided in this chapter. After making such an order, the court shall have no power to set aside, change, or modify it, but nothing in this section shall be construed to limit the right to appeal the order.' [¶] This statute forbids alteration or revocation of an order terminating parental rights except by means of a direct appeal from the order. [Citation.] What we said in connection with the mother's appeal is also true here: Issuance of a writ directing the trial court to vacate the termination order would nullify the Legislature's unambiguous

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[19] *In re Carrie M.* (2001) 90 Cal.App.4th 530, 533-534; *In re Meranda P., supra,* 56 Cal.App.4th at page 1163.

withdrawal of jurisdiction from the court to 'set aside, change, or modify' such an order except by means of a direct appeal from that order. [Footnote omitted.]"[20]

The *Meranda* court explained that "Issuance of a writ directing the trial court to vacate the termination order would nullify the Legislature's unambiguous withdrawal of jurisdiction from the court to 'set aside, change, or modify' such an order except by means of a direct appeal from that order. [¶] Second, there is the rule of law, reaffirmed by the Supreme Court less than a decade ago, that 'habeas corpus may not be used to collaterally attack a final nonmodifiable judgment in an adoption-related action where the trial court had jurisdiction to render the final judgment.'"[21] Here also, father seeks relief from the order terminating parental rights. Habeas corpus may not be used to attack collaterally such an order.[22]

Likewise habeas corpus relief as to father's contention his attorney provided deficient representation by not filing a section 388 petition prior to the .26 hearing also is inappropriate. This contention must be challenged by a direct appeal from the section 366.26 order. We thus conclude father's habeas corpus petition is barred under section 366. 26, subdivision (i) and the waiver rule in section 366.26, subdivision (*l*).

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[20] *In re Meranda P., supra,* 56 Cal.App.4th at page 1161.

[21] *In re Meranda P., supra,* 56 Cal.App.4th at page 1161.

[22] *In re Issac J.* (1992) 4 Cal.App.4th 525, 533; *In re Meranda P., supra,* 56 Cal.App.4th at pages 1160-1166; *In re Janee J., supra,* 74 Cal.App.4th at page 207.

We recognize that, contrary to *Meranda*, there is conflicting case law, such as *In re Darlice C.*,[23] which holds that a claim of ineffective assistance of counsel can be raised by habeas corpus because a parent has a constitutional due process right to effective assistance of counsel.[24] Even assuming section 366.26, subdivision (i) does not bar father's habeas corpus IAC claims as to not filing a section 388 petition and representation at the .26 hearing, these writ petition and appeal IAC claims are without merit.

A. Section 388 Petition

"Section 388 allows an interested person to petition the juvenile court for a hearing to change, modify or set aside a previous order if the petitioner can establish changed circumstances and that the proposed order would be in the best interests of the child. The burden of proof is on the petitioner."[25] To justify a modification of previous orders, the circumstances must be changed, not merely "changing."[26]

Here, there was no basis for filing a section 388 petition alleging changed circumstances or new evidence shortly before the .26 hearing. Nothing in the record, or in the petition, demonstrates the existence of changed circumstances or new evidence.

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[23] *In re Darlice C.* (2003) 105 Cal.App.4th 459.

[24] *In re Darlice C., supra,* 105 Cal.App.4th at page 463.

[25] *In re Cliffton B.* (2000) 81 Cal.App.4th 415, 423.

[26] *In re Casey D.* (1999) 70 Cal.App.4th 38, 47; *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.

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Father was still incarcerated with a release date in January 2004. He had continued to make a concerted effort to comply with his reunification plan and attend various programs.

The only changed circumstances subsequent to the six-month hearing consisted of father transferring from the Susanville prison to Corcoran prison and continuing to enroll and participate in various rehabilitation and parenting programs. No significant changes had occurred. Also, father's anticipated release from prison on some future date did not constitute changed circumstances at the time of the section 366.26 hearing. The alleged changed circumstances had not yet occurred.

If father's attorney had filed a section 388 petition, it would have been frivolous. We thus are unable to say that counsel was ineffective in failing to file a section 388 petition alleging changed circumstances. There was no basis for such a petition.

B. Representation at the .26 Hearing

Father complains his attorney incorrectly believed there is a "go to prison, lose your child" law in California and failed to research the law in this regard. Had she done so, father claims she would have discovered that *In re Monica C.*[27] provides authority for ordering long-term guardianship rather than adoption for children of incarcerated parents. Father argues that his attorney failed to apprise the court of the *Monica* decision at the .26

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[27] *In re Monica C.* (1995) 31 Cal.App.4th 296.

hearing and, as a consequence, the court believed it had no alternative but to terminate parental rights and order E.S. placed for adoption.

Father has not established in his appeal or habeas corpus petition a showing that his attorney's representation at the .26 hearing fell below an objective standard of reasonableness under prevailing professional norms. At the .26 hearing, both counsel for mother and father requested the court to grant guardianship, rather than terminate parental rights and place E.S. for adoption, but they did not cite any case law supporting such an order. During a court recess, the court researched the issue of whether it had authority to order long-term guardianship rather than adoption and concluded that there was no applicable exception to statutorily mandated termination of parental rights and adoption.

The fact that both the court and mother's attorney were also either unaware of the *Monica* decision or did not find it persuasive authority indicates father's attorney's failure to mention the case to the court does not constitute IAC. Furthermore, *Monica* does not provide persuasive authority for ordering long-term guardianship in the instant case.

In *Monica* the DPSS argued visitation could serve no purpose because the mother's sentence exceeded the 18-month limitation on reunification services. In the instant case there is a six-month limitation under section 361.5, subdivision (a)(2). The *Monica* court disagreed that visitation served no purpose, explaining that an incarcerated parent could avoid losing his or her child under sections 366.21 and 366.26 by placement

of a child in a long-term guardianship with a relative or with a friend nominated by the parents. "[T]he guardianship could provide for visitation by the mother [citations] and could later be terminated by court order if it should be in the child's best interest. [Citations.] Under Section 366.3, subdivision (b), the termination of a guardianship may sometimes lead to reunification with the parent."[28]

In *Monica* the court concluded that, since the DPSS had refused to give any consideration to a prospective guardian nominated by the mother, the trial court erred in finding that reasonable reunification services had been provided to mother. The court in *Monica* directed the juvenile court on remand to continue reunification services for six months and hold a final 18-month review hearing.[29] *Monica* is distinguishable for several reasons. First, all orders subsequent to the dispositional order "are directly appealable without limitation, *except for post-1994 orders* setting a .26 hearing when the circumstances specified in section 366.26, subdivision (*l*) exist."[30] The 12-month hearing order terminating reunification services in *Monica* was entered in June 1993 and thus was not subject to the waiver rule, as in the instant case. Here, the issue of the reasonableness of reunification services was waived due to the failure to file a 39.1B petition, as required under section 366.26, subdivision (*l*).

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[28] *In re Monica C., supra,* 31 Cal.App.4th at pages 308-309.

[29] *In re Monica C., supra,* 31 Cal.App.4th at page 310.

[30] *In re Janee J., supra,* 74 Cal.App.4th at page 206, italics added.

Second, *Monica* is distinguishable factually. Unlike in *Monica*, there is no contention the DPSS failed to investigate a potential placement option, and reasonable reunification services were provided. The court authorized visitation but it was not logistically feasible or in the best interests of E.S. due to E.S.'s tender age and father's incarceration in a distant prison. In addition, there was no evidence of any bond between father and E.S.

In addition, the circumstances in *Monica* are entirely different from the instant case since, here, the court maintained E.S.'s placement with his great-aunt and ultimately ordered E.S. placed for adoption with her since she wished to adopt E.S. The court did not terminate stable placement with a relative as in *Monica*. In *Monica* the trial court initially ordered the child placed with a great-aunt then terminated the placement and ordered the child placed for adoption by a nonrelative because the aunt did not want to adopt the child. The *Monica* court concluded long-term guardianship during the mother's incarceration should have been considered.

Monica does not provide persuasive authority for the proposition that the court erred in placing E.S. for adoption rather than guardianship. In *Monica*, the great-aunt did not wish to adopt the child because doing so would prevent the mother from reuniting with the child. Here, E.S.'s great-aunt wished to adopt him, he had lived with her almost his entire life, and he had bonded with her and had no bond with father.

". . . [i]n enacting section 366.25 . . . the Legislature expressed its preference for 'stable, permanent homes for children' as opposed to foster care placements and other

potentially temporary provisions for care given to dependent children. The inclusion in the section of carefully prescribed time periods to report and review of the living situation of dependent children support the conclusion that the Legislature is concerned with the early *adoptability* of such children, and cognizant that the passage of time operates to deprive such children of their chance in this regard."[31]

Generally, once reunification services are terminated and a .26 hearing is set, the goal of the statutory dependency scheme "is to place the child in an adoptive home where he or she will have the benefits of stability and security. In this way, the state acts to prevent the psychological harm caused by moving a child from foster home to foster home. [Citation.]"[32] This is because "The reality is that childhood is brief; it does not wait while a parent rehabilitates himself or herself. The nurturing required must be given by someone, at the time the child needs it, not when the parent is ready to give it. [¶] The Legislature has expressed increasing concern with the perceived and accurate reality that time is of the essence in offering permanent planning for dependent children."[33] """There is little that can be as detrimental to a child's sound development as uncertainty

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[31] *Jones T. v. Superior Court* (1989) 215 Cal.App.3d 240, 250.

[32] *Jones T. v. Superior Court, supra,* 215 Cal.App.3d at page 250.

[33] *In re Debra M.* (1987) 189 Cal.App.3d 1032, 1038; *Jones T. v. Superior Court, supra,* 215 Cal.App.3d at pages 250-251.

over whether he is to remain in his current 'home,' under the care of his parents or foster parents, especially when such uncertainty is prolonged." [Citation.]'"[34]

Adoption, as opposed to long-term guardianship or foster care, is the preferred placement because "[t]he goal of permanency planning is to end the uncertainty of foster care and allow the dependent child to form a long-lasting emotional attachment to a permanent caretaker. 'Foster placement, being temporary, does not do the trick because it warns the adults against any deep emotional involvement with the child. Even adoptive parents may hesitate to make a full commitment to the child as long as the placement is not irrevocable.' [Citation.]"[35] Although guardianship may be a more stable solution than foster care, it is not irrevocable and thus falls short of the secure and permanent placement intended by the Legislature.[36]

As the court explained in *Jones*, "Although [father] and [mother] may prefer not to have their parental rights terminated and thus offer guardianship as a less drastic alternative, the Legislature has emphasized it is the child's welfare, not the parents' welfare, that is paramount.[[37]] Given the Legislature's express intent to provide

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[34] *In re Meranda P., supra,* 56 Cal.App.4th at page 1162, quoting *In re Alexander S.* (1988) 44 Cal.3d 857, 868 and *Lehman v. Lycoming County Children's Services* (1982) 458 U.S. 502, 513-514.

[35] *In re Emily L.* (1989) 212 Cal.App.3d 734, 742, quoting *In re Micah S.* (1988) 198 Cal.App.3d 557, 566 (Bauer, J., conc.).

[36] *Jones T. v. Superior Court, supra,* 215 Cal.App.3d at page 251.

[37] Civil Code sections 232, subdivision (b), 232.5, 232.6.

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permanent, stable homes for minors who cannot be returned to their parents, and the court's findings here that return to their parents would be detrimental to the minors, the minors are not likely to be returned to their parents within the next six months, and the minors are adoptable, the court did not err in failing to consider guardianship as a less drastic alternative to adoption."[38]

Likewise, here, it was not likely E.S. would be returned to mother and he could not be returned to father within six months because father was in prison and it was anticipated he would remain there for almost another full year after the .26 hearing. Under the circumstances in the instant case, we conclude father's attorney's representation was not unreasonably deficient and, even if it was, it is not reasonably probable the result would have been any different.

4. Disposition

The judgment is affirmed and the petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ Gaut
J.

We concur:

/s/ McKinster
Acting P.J.

/s/ Richli
J.

[footnote continued from previous page]

[38] *Jones T. v. Superior Court, supra,* 215 Cal.App.3d at page 252.